Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: December 5, 1997
CASE NO: 96-INA-359

In the Matter of:

WORK, INC.
Employer

On Behalf of:

ELAINE STACEY MCMILLAN
Alien

Appearance: Elizabeth A. Ziemba, Esquire
Boston, MA
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney

General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27 (c).

Statement of the Case

On March 13, 1995, Work, Inc. ("employer") filed an application for labor certification to enable Elaine Stacey McMillan ("alien") to fill the position of Casework Manager at an annual salary of $ 23,400 (AF 115). The job duties are described as follows:

> Serve as primary liaison between day habilitation program, residents, staff, community, DMR, DPW, and service co-ordinators for non-profit training and employment program for adults with disabilities; facilitate effective transition of referrals, ensure assessment by program members, Develop, maintain, co-ordinate individual service plans; develop and facilitate implementation of all programming related behavior change and skill acquisition; crisis intervention; review program data collected by Community Training Specialists to ensure compliance, interpret and report to Program Manager on program data; make appropriate referrals to psychologists, counselors and other resources (AF 115).

The job requirements are a Bachelor's degree in Human Services with two years of experience as a Community Training Specialist or an Associate's degree in Human Services with three years of experience as a Community Training Specialist. The employer also required that the incumbent possess a driver's license.

On January 25, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited a violation of § 656.21 (b) (6) which provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. The CO noted that the employer rejected several applicants because they did not possess the required experience as a Community Training Specialist. However, the CO found that these applicants were unlawfully rejected because they had comparable professional experience. The CO also noted that the employer rejected several applicants because they lacked experience working with the mentally retarded population, even though the employer did not explicitly require this type of experience. The CO also found that the employer was not in compliance with §656.21 (b) (5) which requires that the employer document that the job requirements are the minimum necessary for the performance of the job, and that it has not hired workers with less

[1] All further references to documents contained in the Appeal File will be noted as "AF."

training or experience, or that it is not feasible to hire workers with less training or experience, than that required by the employer's job offer. The CO noted that the alien did not possess the required experience as a Community Training Specialist.

In rebuttal, dated February 28, 1996, the employer explained that the nature of its work involves managing day habilitation programs which are designed to assist mentally retarded individuals. The employer stated that these programs are highly regulated and that the well-being of their clients, as well as the program's accreditation, depends on its employees meeting certain regulatory job criteria. The employer argued that it did not reject candidates solely because they did not have experience as a Community Training Specialist, but evaluated each candidate's overall qualifications to determine if they were qualified for the position. The employer contended that it was implicit in the job requirements that applicants have experience working with mentally retarded people. Additionally, the employer offered reasons for rejecting each of the 15 applicants. The employer also argued that the alien fully met the minimum requirements for the position even though she did not work as a Community Training Specialist prior to her employment with the employer. The employer maintained that she attained five years of equivalent experience while working for the Winchester Health Authority in England (AF 14).

The CO issued the Final Determination on March 28, 1996 denying certification. The CO determined that the employer resolved the issue regarding the alien's qualifications, but continued to dispute whether the employer provided lawful, job-related reasons for rejecting several U.S. applicants (AF 7). Specifically, the CO found that Applicant Danielle Franklin was qualified for the job as she possessed relevant work experience and a B.S. in Human Services. The CO determined that based on her prior work experience with individuals who had psychiatric and substance abuse problems, Ms. Franklin could reasonably perform the duties of the position. On May 1, 1996, the employer requested administrative review of Denial of Labor Certification (AF 1).

Discussion

The issue presented by this appeal is whether the employer provided lawful, job-related reasons for rejecting U.S. applicants pursuant to § 656.21 (b) (6) of the regulations.

Generally, an employer must show that U.S. applicants are rejected solely for lawful, job-related reasons. § 656.21 (b) (6). The job opportunity must have been open to any qualified U.S. worker. § 656.20 (c) (8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. § 656.2 (b).

The Board has repeatedly held that an applicant is to be considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991); *Mancil-las International Ltd.*, 88-INA-321

(Feb. 7, 1990); *Microbilt Corp*., 87-INA-635 (Jan. 12, 1988). Moreover, the Board has held that an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *Sterik Co.*, 93-INA-252 (Apr. 19, 1994); *American Cafe*, 90-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 88-INA-492 (Sept. 19, 1990); *Richco Management*, 88-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 88-INA-29 (Apr. 7, 1988).

In the Final Determination, the CO found that the employer failed to provide convincing evidence that Applicant Danielle Franklin could not perform the duties for this position in a reasonable manner. Specifically, the CO disputed her rejection because she possessed the minimum education requirements along with two years of experience working with psychiatric and substance abuse patients. The employer argued that Ms. Franklin was lawfully rejected because the individuals with whom she worked did not have diagnosed disabilities.

The Board has held that where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Nancy, Ltd.*, 88-INA-358 (Apr. 27, 1989) (*en banc*); *St. Barbara's RC Church*, 93-INA-48 (June 7, 1994); *Hambrecht Terrel International*, 90-INA-358 (Dec. 11, 1991). We find that principle is applicable to the case at bar and that the employer had the obligation to further investigate Ms. Franklin's qualifications. In rebuttal argument, the employer indicated that it was impossible to identify the population with whom she had gained her work experience without contacting her for clarification. If that indeed was the case, the employer had an obligation to contact her. Since the employer failed to fully investigate Ms. Franklin's qualifications, we hold that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and**, (2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.